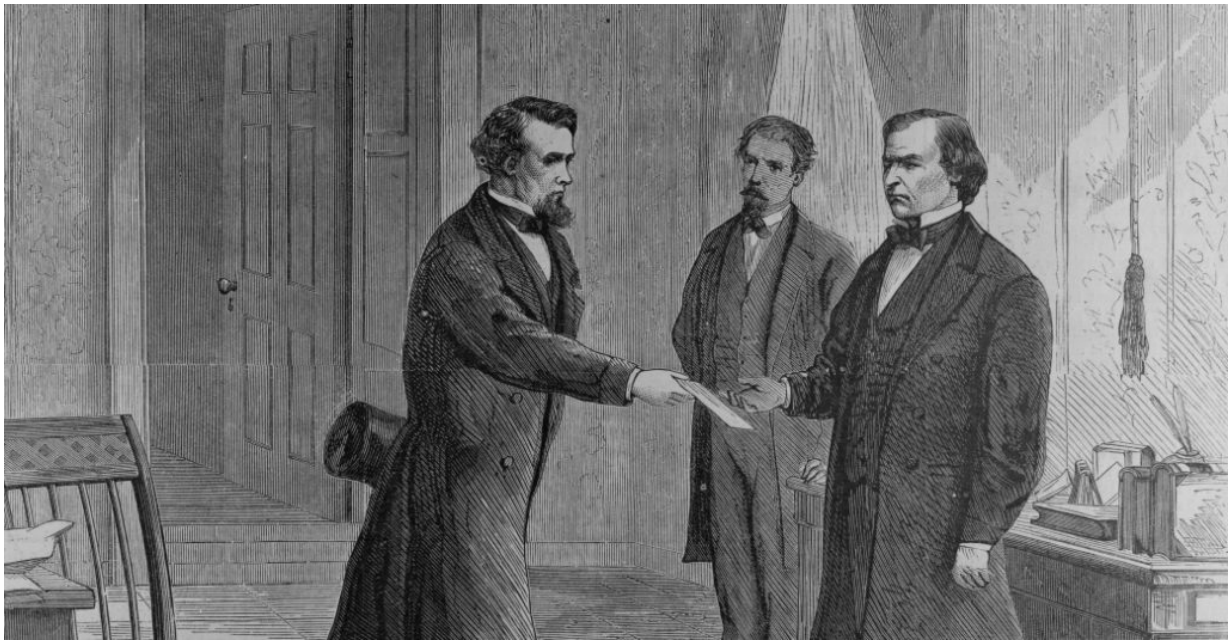
JUNE 28, 2018

Alexander Hamilton, Federalist 65, high crimes and misdemeanors, Impeachment, President Andrew Johnson, President Richard Nixon, President Trump

Taking Impeachment Seriously

by MICHAEL STOKES PAULSEN



George T. Brown, sergeant at arms of the Senate, serving the summons on President Andrew Johnson, from Harper's Weekly, March 28, 1868. Courtesy Library of Congress

Editor's Note: *This is the first in a series of posts by Michael Stokes Paulsen on the formidable impeachment power.*

The constitutional power of impeachment deserves to be taken seriously. Talk of impeachment fills the air these days. But not all of that talk is intelligent, and much of it is constitutionally unsound.

Two equal and opposite errors tend to plague today's public and political discussions of impeachment. On the one side, there are the shallow, partisan screeds and overwrought allegations against President Trump—typically but not exclusively flung by the political left—that would reduce impeachment to a low-political device for giving vent to partisan policy objections to a despised administration. As I will discuss (eventually), there is much that is potentially impeachable in Trump's conduct; but a lack of discernment and sound constitutional judgment tends to infect, and distract from, the correct focus of possible charges. On the other side, however, there is the reflexively narrow understanding of the constitutional power of impeachment as limited to the grounds of serious, smoking-gun criminal wrongdoing by officeholders, of a type that would constitute a provable criminal-law (federal) statutory offense. No "gotcha," no impeachment. No proven criminality, no impeachable offense. (As I will discuss, this view accounts for the excessive focus on the Department of Justice's quasi-independent criminal investigation of possible offenses committed by President Trump's friends, campaign associates, family members, or by Trump himself.)

Both views are wrong.

In a series of posts over the next few weeks, I propose to set forth what I believe to be the proper understanding of Congress' power to impeach, and upon conviction remove, federal civil officers (that is,

executive branch officials and federal judges) for *what Congress judges to be* "Treason, Bribery, or *other high Crimes and Misdemeanors*."

The italicized language is key, in both respects. The power of impeachment is committed in large part *to Congress's* good-faith constitutional judgment—the House of Representatives in deciding to impeach and a two-thirds majority of the Senate in deciding to convict or acquit of the House's charges. And the broad language of the impeachment standard supports—invites—precisely such a broad range of judgment and discretion. "Treason" and "Bribery" have fairly clear, determinate meanings. Today's common understanding does not differ meaningfully from the original meaning of these words – the meaning they had at the time and in the context they were adopted. But "*other high Crimes and Misdemeanors*" states an indefinite standard. What is the *original meaning*—that is, I submit, the relevant inquiry—of this constitutional term of art? That is: what is the meaning these words, and this phrase, would have had to reasonable, informed readers and speakers of the English language, using these terms, in America, at or about the time of the Constitution's adoption?

There is much good—and some less good—literature on this important constitutional question. I will draw to some extent on research done by others, but I will offer my own analysis. Along the way, I will critique (sometimes harshly) academic and political views expressed by others. The Trump presidency has spurred the production of new, quickie books and so-called "citizens' guides" on impeachment generally, and on Trump specifically. (I hope to offer a few short "reviews" of some of these books.)

Reduced to barest terms, my thesis is this: The power of impeachment was meant to be formidable. The framers of the Constitution understood impeachment as a vital, potent legislative check on abuse or misuse of power or other serious misconduct by officers of the executive and legislative branches—a critical part of the Constitution's separation-of-powers, checks-and-balances scheme. The term "high Crimes and Misdemeanors" had, and has, *no fixed, limited, determinate meaning*. Rather, the framers consciously borrowed a broad and indefinite English standard vesting a substantial range of judgment in the legislature concerning what types of misconduct are sufficiently serious to warrant an official's removal from office. The phrase "high Crimes and Misdemeanors" is a *specific* historical-legal term of art. But it is one with a *broad* meaning and range of application.

Impeachment plainly is not *limited to* commission of ordinary criminal-law offenses. (The historical evidence in support of this is really quite overwhelming, as I will show in a later post.) Of course, impeachment grounds *can include* commission of ordinary criminal-law crimes. The Framers recognized that the categories can overlap, and deliberately designed impeachment as a political procedure limited to removal from office, while preserving the separate possibility of criminal indictment, trial, and punishment. (I will set forth the evidence for this proposition, too.)

But the broad point is that the constitutional power of impeachment covers a good deal more ground than ordinary criminality. As Alexander Hamilton described it (in *The Federalist* No. 65), the power of impeachment extends to "offenses which proceed from the misconduct of public men, or in other words, from the abuse or violation of some public trust." Such offenses "are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself." As such, they are properly subject to the political remedy of removal from office, and exercised by political bodies – the House, in deciding to impeach, and two-thirds of the Senate in deciding whether to convict.

The "nature of the proceeding," Hamilton continued, is such that it "can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor personal security." (Note again the crisp distinction between the realms of impeachment as a political-constitutional remedy and criminal prosecution as a legal one.) Instead, Hamilton refers to the "awful discretion which a court of impeachment must have" to

"doom to honor or to infamy" federal civil officers that Congress judges to have engaged in culpable misbehavior.

Nobody at the time disputed Hamilton in this regard. All prominent statements made concerning the scope of the impeachment standard, in the debates at the Constitutional Convention, and in the state ratification debates, are in agreement here. Delegates disagreed over whether the impeachment power *should* be so broad, and whether it was proper to vest such broad discretion in the Senate, but no one ever doubted that the impeachment standard itself vested an extraordinarily broad discretion in the two houses of Congress – for better or for worse.

In his papers on the judiciary, Hamilton applied this same broad standard to the courts, embracing the propriety of impeachment as an "important constitutional check" of the legislature on misuse of judicial power: Congress properly may respond to a "series of deliberate usurpations of authority" by judges by "punishing their presumption by degrading them from their stations." (*The Federalist* No. 81.) I will have more to say about this important, arresting proposition in subsequent posts specifically addressed to the question of the propriety of impeaching judges specifically for their believed abuse of the judicial power itself.

It follows from the historical meaning of the Constitution's impeachment standard that Congress legitimately may exercise the power of impeachment for a broad range of what it judges to be culpable misconduct by national officeholders, including: believed serious violations of the Constitution or departures from sworn constitutional duty and fidelity; misuse or abuse of constitutional powers actually possessed; serious failure in the performance of the constitutional responsibilities of office (including culpable negligence, incompetence, or maladministration as well as affirmative wrongful acts); betrayal or compromise of the national interest, disloyalty, or an intolerable conflict of interest between an officer's personal interests and the duties of office (extending considerably beyond constitutional "treason"); violation of the public trust, or dishonesty in public behavior; substantial and willful criminal-law violations of a serious nature judged incompatible with continuance in important national office (including but not limited to treason, bribery, and other corruption-type offenses); and, finally, other types of non-criminal misconduct or misbehavior Congress judges to be of a sufficiently serious and intolerable character as to be incompatible with the function and purpose of the office in question – including such things as use of an office for mere personal profit, benefit, entertainment, or enjoyment, engaging in sexually predatory or harassing behavior (especially involving government subordinates), or behavior evincing virulent racism or other similar discriminatory animus.

There are important examples of each of these types of misconduct presented by prior impeachment proceedings. Some of these proceedings ended in removal of the misbehaving official from office. Some did not, either because the misconduct at issue was deemed not proved or because it was considered insufficiently important or consequential to warrant the official's removal.

My rough plan for this series of posts is as follows: I intend to take up first the broad question of the proper understanding of the Constitution's impeachment standards and other provisions, as an abstract matter—separate from any discussion of its application in specific instances. If examination of the Constitution's actual, original meaning yields certain controlling principles, *those are the correct controlling principles*. Those principles should be followed wherever they properly lead, and applied in a principled manner *irrespective of whose political ox might thereby be gored*.

On this score, there is plenty of political hypocrisy to go around. Many Democrats, trapped by having painted themselves into a corner twenty years ago, now argue for a contrived standard, seemingly designed to gerrymander the Constitution's impeachment standard to produce a test supporting impeachment of Donald Trump but excusing President Bill Clinton. (There are a couple of new books on impeachment that suffer from this problem.) So too, many Republicans appear reluctant to embrace, as to Trump, standards of conduct they

were perfectly willing to impose on Clinton. For them, too, the impeachment standard needs to thread a needle. The artful crafting simply runs in the opposite direction: the standard adopted needs to validate the impeachment effort directed at Clinton but exclude most possible grounds for removal of Trump short of provable criminal-law felonies. (For some, the argument is a bit different: since Clinton got away with wrongdoing, it would be unfair to hold Trump to complete account for his actions. That, I think, is hypocrisy too, but of a slightly different flavor.)

After discussing the meaning of the Constitution's impeachment standard as a general proposition, I will turn to discussing its implications for, and application to, impeaching particular presidents, vice presidents, other executive officers, and judges. I hope to begin that aspect of the discussion by taking up the three most important cases of prior presidential impeachment proceedings: the 1868 impeachment and near-conviction of President Andrew Johnson; the impeachment effort directed at President Richard Nixon in 1974, cut short by his resignation from office; and the impeachment and trial of President Bill Clinton in 1998 and 1999.

For an advance peek at my views on certain presidents: I wrote about the Johnson impeachment, in a short post for *Law and Liberty* a few months ago, on the occasion of the 150th anniversary of the House's vote to impeach. I wrote about *U.S. v. Nixon* nearly 20 years ago for the *Minnesota Law Review*, on the occasion of the 25th anniversary of the decision by the Supreme Court in August 1974. My article, published in 1999, was written in the midst of the impeachment proceedings against Clinton, and included some pointed discussion about the propriety of Clinton's impeachment.

I also propose to discuss, at least briefly, what a correct understanding of the Constitution's impeachment standard might suggest concerning the propriety of possible impeachments of *other* U.S. presidents in our nation's history—and of some miscreant vice presidents as well. (Aaron Burr and Spiro Agnew come prominently to mind.)

Then, and only then, will I take up the case of President Trump. The standard I have set forth above for what all might constitute "high Crimes and Misdemeanors" within the meaning of the Constitution obviously has important implications for the propriety of impeaching Trump. However one thinks about applying the constitutional standard, I will insist that the resolution must be *principled*. The one approach that cannot possibly be right is that the Constitution should be applied differently as to presidents of one's own political views or party than it is applied to presidents of the opposition political party.

A final group of posts will consider the question of proper grounds for impeachment of federal judges and Supreme Court justices. I suspect that this, rather than the discussion of presidential impeachment grounds, will prove the more controversial and debatable set of conclusions. For under some of the same criteria under which a President might properly, constitutionally, be impeached—violation of the Constitution, violation of the Oath of Office, abuse or misuse of constitutional power properly possessed, and willful, culpable failure to perform faithfully and responsibly the functions and duties of office—it follows that judges and justices rightfully may be impeached for what Congress (the House, and a two-thirds majority of the Senate) judges to be a sufficiently egregious pattern of judicial actions or decisions in violation or disregard of the Constitution, or otherwise willfully ignoring, manipulating, or flouting controlling law. (I have staked out this position before, in other academic and blog-post writing.)

If the power of impeachment is taken seriously, on terms consistent with its original meaning and evidence of historical understanding, that power must be understood as an intentional—and formidable—legislative check on judicial power as well as on executive power. If Hamilton is right, much of our modern understanding and practice with respect to the (supposed) inviolability of judges' decisions to the "important constitutional check" of impeachment is wrong.

I will start, in my next post, with some brief consideration of preliminary points of constitutional interpretive methodology. What is the proper approach (or legitimate range of approaches) to understanding the Constitution's provisions and applying them faithfully? To avoid talking past one another—about impeachment or any other constitutional topic—it is important to make clear the constitutional premises from which we begin.

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About the Author ›

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